Supreme Court, U.S.
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No. 01-1154

In The

Supreme Court of the United States

REALTY ONE, INC.,

Petitioner,

v.

RE/MAX INTERNATIONAL, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioner Realty One, Inc. respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Respondents' brief raised four issues not addressed in Petitioner's Petition for a Writ of Certiorari which are incorrect as a matter of fact and law or irrelevant to the question presented for resolution here.

1. Respondents' argument that the decision below is not contrary to this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), that of every other circuit court decision which has considered this issue, and earlier decisions in the Sixth Circuit is based on a misreading of the record and *Kokkonen*. Respondents argue that the second sentence of the July 14 dismissal order which states "[a]ny subsequent order setting forth *different terms and conditions relative to the settlement and dismissal* of the within action shall supersede the within order" Pet. App. 67a (emphasis added), "reserves authority to issue subsequent orders altering the terms and conditions of the settlement." Res. 10. Respondents' statement assumes the answer they seek – that the district court reserved jurisdiction to enforce the settlement agreement. It did not.

The language selected by the district court is consistent with the terms of the July 13 settlement agreement and the limits of the court's authority. The July 13 settlement agreement states that the parties will undertake to write additional papers to compliment and/or supplement their complete and binding settlement agreement.

The July 14 dismissal order permits the district court, should the parties of their own accord decide to alter the terms of their contract, to enter the new terms on the record in lieu of, or in addition to, those the district court had previously entered on July 13 when it read the terms of the agreement into the record. The district court's July 14 dismissal order does not, and could not, give the court authority to alter the terms of the settlement contract. The parties write settlement agreements, not the court.

If Respondents wanted the court to retain jurisdiction to enforce the agreement the term should have been included in the July 13 settlement agreement, not raised in a motion to enforce settlement after dismissal with prejudice. Respondents chose not to negotiate to include that term in the agreement and should not be permitted to add it now by misinterpreting the dismissal order.

Moreover, Respondents' interpretation of the July 14 dismissal order would permit the district court to extend its jurisdiction beyond the limits set by the Constitution, encroach into areas typically reserved for state courts, and impermissibly assume the settlement contract writing authority of the parties – authority which would undermine the entire settlement process. The order does not give the district court this authority, nor could it.

2. Respondents claim that this case is a "poor vehicle" because Realty One "concedes that there was 'no motion in the record by the plaintiffs as required by Rule 41(a)(2). . . . ' " Res. 12. This claim is belied by the record.

First, Realty One did not make any such concession. Realty One merely pointed out the discrepancy between

the Sixth Circuit's claim that the basis for the July 14 dismissal order was Rule 41(a)(2) and Respondents' argument that it could not have been Rule 41(a)(2). Pet. 21.

Second, Respondents' claim that the basis for the dismissal order was not Fed. R. Civ. P. 41(a)(1) (stipulation of the parties) or that such an order could not be entered for 45 days also mischaracterizes the record. The July 14 dismissal order does not cite any provision of the Federal Rules. The basis for the dismissal order is the stipulation in the July 13 settlement agreement. Pet. App. 70a. In substance, the settlement agreement is the stipulation of the parties. Thus, the dismissal order meets the requirements of Fed. R. Civ. P. 41(a)(1), contrary to Respondents' claim.

Third, the settlement agreement does not state that the July 14 dismissal order is to be delayed for 45 days as Respondents claim. Pet. App. 68a-74a. If Respondents thought the entry of the dismissal order should have been delayed by 45 days or the dismissal with prejudice was improper, they should have presented this issue in the district court on a Fed. R. Civ. P. 60(b) motion. The fact that Respondents chose not to file such a motion precludes them from making this argument at this late date. Sup. Ct. R. 14(1)(g)(i).

Finally, the July 14 dismissal order is not an administrative closing. Administrative closings are a method "used in various districts throughout the nation in order to shelve pending, but dormant cases." *Lehman v. Revolution Portfolio LLC*, 166 F.3d 389, 392 (1st Cir. 1999) (citations omitted). *See also* 12 James Wm. Moore et al., *Moore's*

Federal Practice ¶ 60.24 (3rd Ed. 2001) ("[a]n administrative closing may be ordered, for example, in order to await the lifting of the automatic stay imposed by the Bankruptcy Code, or when prosecution of suit must be deferred indefinitely to permit the completion of an arbitration proceeding"). When this point was raised in the district court after Realty One moved to dismiss the motion to enforce for lack of jurisdiction, it was overruled and not presented in the court of appeals. J.A. 1405-07, 1515-18, Pet. App. 43a-46a, 79a. The reason is clear: an order which directs "that the docket be marked, 'settled and dismissed with prejudice' " is not an administrative closing order, it is an order of dismissal with prejudice.

3. Respondents' litany of incorrect and irrelevant facts should be seen for what it is: subterfuge in an apparent effort to cloud the important issue of federal jurisdiction presented here. For example, there was no direct evidence of a conspiracy. The mistrial was not granted *sua sponte* but with the specific agreement of their counsel who stated: "we agree with the Court at this point in that it's time to declare a mistrial" and after the jury recanted its initial finding that there was an agreement based on a corrected instruction of law. J.A. 1742. The court gave the jury the corrected instruction after counsel for all parties submitted additional proposed instructions because a jury note to the court indicated they had misinterpreted an instruction earlier and relied on that misunderstanding to conclude that there was an agreement (the finding they recanted later). Respondents were not deprived of the benefit of the settlement since it is undisputed that Realty One paid the sums stated in the settlement agreement and complied with all business

terms. Pet. App. 10a. Any issues concerning additional contract provisions can, if necessary, be litigated in the appropriate state court.

In any event, these and other similar assertions are irrelevant. The issue before the Court is the district court's improper assertion of jurisdiction over a motion to enforce a settlement agreement when the order which dismissed the case with prejudice does not incorporate the settlement agreement into it or specifically retain jurisdiction to enforce the settlement agreement. The extraneous issues raised by Respondents are not relevant to this fundamental question.

4. Respondents' claim that this case is not important and worthy of this Court's consideration because the decision below will not "discourage settlements" misses the mark. Res. 9. The district court's assertion of jurisdiction beyond the limits established by the Constitution and the congress is clearly of fundamental importance. Concomitantly, the exercise of that improperly asserted judicial power to encroach on traditional state court jurisdiction – the power to hear contract disputes – and the sole right of parties to a lawsuit to agree, disagree, negotiate, and enter into – or not enter into – any agreement they deem appropriate to resolve that lawsuit presents a fundamental and important question.

In sum, the question presented for resolution here is of fundamental importance because: 1) it concerns the limits of federal judicial power and whether district courts can, on their own, extend those limits; 2) it impacts the relation between federal and state courts since the latter traditionally hear simple contract disputes such as

this; and 3) it impacts on the settlement of federal lawsuits since parties will undoubtedly be reluctant to enter into settlement agreements in those courts if the district court can assume the role of the parties and rewrite their agreements as was done here. Ultimately, this case involves the question of whether the Constitution and congress define the limits of the district court's judicial power and whether the distinct court is required to follow those limits as defined by this Court in decisions such as *Kokkonen*. We submit that this question, and the split in the circuits which has resulted from the decision below, are fundamental questions squarely presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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